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IT IS SO ORDERED.

Dated: February 11, 2011




Burton Perlman
United States Bankruptcy Judge

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

In Re:	:	Case No. 10-13407
	:	
Eddie Meade	:	Judge Burton Perlman
Kristine Meade,	:	
	:	Chapter 13
Debtors.	:	

DECISION RE: TRUSTEE'S OBJECTION TO CONFIRMATION

This matter is before the court on the Chapter 13 Trustee's objection to confirmation, and the supplemental memorandum in support of her objection. Debtors Eddie and Kristine Meade filed a response to the objection. An agreed order has conditionally resolved issues raised in the Trustee's objection to confirmation related to deficiency claims. This Decision resolves issues related to the Trustee's contention of inadequate distribution to unsecured creditors. This issue requires interpretation and application of the statutory terms "projected disposable income," and "applicable commitment period."

I. Jurisdiction.

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and the general order of reference entered in this district. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(L).

II. The Proposed Plan and Contentions of the Parties.

Debtors filed their chapter 13 bankruptcy case with a proposed plan on May 18, 2010. In their plan, debtors proposed to make monthly payments based on their monthly net income of \$157.00. This figure was derived from the debtors' schedules I and J, which show a monthly net income of \$157.39. Debtors originally proposed to make this \$157.00 payment for fifty-four months. On July 7, 2010, debtors filed an amended chapter 13 plan which had been proposed to account for a 401(k) loan that would be paid off during the life of the plan. The amended plan both (1) stepped up payments from \$157.00 to \$437.00 in the forty-fourth month of the plan, when the 401(k) loan was estimated to have been repaid, and (2) shortened the plan from fifty-four to forty-seven months. In both the original and amended chapter 13 plans, debtors proposed to pay a three percent dividend to unsecured creditors. Debtors' amended plan was withdrawn August 18, 2010. It is the original plan, therefore, which is now before the Court.

The Chapter 13 Trustee asks the Court, in her objection and supplemental memorandum, to consider requiring debtors to fund a higher plan percentage: between five and ten percent. In her supplemental memorandum, the Trustee argues that debtors have a duty to fund a higher plan percentage pursuant to both (1) persuasive precedent, Whaley v. Tennyson (In re Tennyson), 611 F.3d 873 (11th Cir. 2010), that requires all above

median debtors to have a plan that extends for sixty months, and (2) the good faith obligation contained in 11 U.S.C. § 1325(a)(3). The Trustee then calculates what she deems to be the total available plan funding, including those funds that will be available once the 401(k) loan is repaid, and using debtors' original plan length of fifty-four months. This calculation has debtors paying \$157.00 per month for the first forty-three months and \$437.00 per month for the remaining eleven, making a total of \$11,558.00 available to fund the plan. The Trustee asserts that this amount would easily fund a ten percent plan.

Debtors contend that they are not required to sustain a plan for sixty months, because their monthly disposable income (as calculated per 11 U.S.C. § 1325(b)(3)) is a negative number. Further, debtors argue that income attributable to Mr. Meade's overtime pay, as indicated on their Schedule I, is unreliable—if available at all. Therefore, debtors conclude that any “step up” would be unjust and likely fatal to the to the chapter 13 plan's success.

III. Discussion.

This bankruptcy case is governed by Title II of the United States Code, (the "Bankruptcy Code"), including those amendments introduced by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”). See 109 P.L. 8, 119 Stat. 23. Pervading the BAPCPA amendments was a concern of Congress for the improvement of the treatment of creditors. See Burden v. Seafort (In re Seafort), 437 B.R. 204, 220 (BAP 6th Cir. 2010); In re Green, 431 B.R. 187, 190 (Bankr. S.D. Ohio 2010); H.R. Rep. No. 109-31, pt. 1, at 2 (2005), U.S. Code Cong. & Admin. News 2005, pp. 88, 89. It did so by introducing the "means test," which for chapter 7 is spelled out with specificity in § 707(b). While the chapter 7 provisions apply in only a limited way in chapter 13, they bear

reference here, because clearly they demonstrate the intent of Congress in enacting BAPCPA.

Section 707(b) provides that a chapter 7 case is presumptively abusive and therefore subject to dismissal or conversion if debtor's current monthly income, reduced by IRS determined deductions, and multiplied by 60 is not less than certain specified limits. Thus is a means provided whereby a debtor, who has the ability, must make repayments to his creditors. Clear boundaries are established in chapter 7 for when a chapter 7 debtor may receive a discharge without making any payments to his creditors, and when he is obliged to make such payments. The dividing line is whether debtors adjusted currently monthly income is above or below "(I) 25% of the debtor's nonpriority unsecured claims in the case, or \$7,025, whichever is greater; or (II) \$11,725." § 707(b)(2)(A)(i). There can be no doubt what Congress intended with respect chapter 7 cases. If adjusted currently monthly income was below the benchmark, no question of presumptive abuse could arise. If above, repayment to creditors might be required.

The criteria in chapter 13 are different, but were also set to implement the concern of Congress with repayment to creditors. See Baud v. Carroll (In re Baud),---F.3---, 2011 WL 338001, *11 (6th Cir. 2011). The first step in a chapter 13 analysis is whether a debtor's current monthly income is above or below median. Whether a debtor is above or below median requires a determination of the ratio between current monthly income, and median family income, a ratio hereafter discussed. If current monthly income is below median family income, a thirty-six month plan is required. If current monthly income is at or exceeds median family income further considerations must be pursued.

BAPCPA added substantial new material to § 1325(b). It retained, however, §

1325(b)(1) from existing law, except that the period for which all of debtor's "projected disposable income" was to be paid to creditors under a chapter 13 plan was changed, as was a specification of who was to receive projected disposable income under the plan. §§ 1325(b)(1), 1325(b)(4). It is now provided that unsecured creditors are to receive projected disposable income for the period of the plan. The period for payment was changed from "three year period" to "applicable commitment period." It now reads:

§ 1325 Confirmation of Plan.

* * *

(b)(1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan—

(A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.

* * *

The section authorizes the present objection by the Chapter 13 Trustee to the proposed plan of the debtors, and states the consequences of such an objection. We deal now with issues raised by the Trustee's objection.

A. Length of the Plan.

Prior to the enactment of BAPCA, length of plan was dealt with at § 1325(b)(1) by providing that projected disposable income for a three year period was to be paid to creditors. Congress made a very significant change in replacing "three year period"

with "applicable commitment period." Moreover, § 1325(b)(1)(B) specified that projected disposable income for the period of the plan was to be paid to unsecured creditors. The change in the period of the plan by BAPCPA implements the intent of Congress to require that a chapter 13 debtor must maximize repayment to creditors to the extent that the debtor's means permit, applying statutory criteria. See In re Baud, 2011 WL at * 11. This intent is apparent from BAPCPA's supplementing of §1325(1) with §1325(b)(4). In new § 1325(b)(4), Congress defined what it meant by "applicable commitment period." It repeated the period of three years, but made it clear that in any chapter 13 bankruptcy case where the debtor's current monthly income together with that of the debtor's spouse multiplied by 12 is at or above "median family income," the applicable commitment period must be five years. Thus, BAPCPA's § 1325(b)(4) provides:

§ 1325(b)(4) Confirmation of the plan.

* * *

(b)(4) For purposes of this subsection, the "applicable commitment period"—

(A) subject to subparagraph (B), shall be—

(i) 3 years; or

(ii) not less than 5 years, if the current monthly income of the debtor and the debtor's spouse combined, when multiplied by 12, is not less than—

(I) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner;

(II) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals; or

(III) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals; plus \$625⁴ per month for each individual in excess of 4; and

(B) may be less than 3 or 5 years, whichever is applicable under subparagraph (A), but only if the plan provides for payment in full of all allowed unsecured claims over a shorter period.

(c) After confirmation of a plan, the court may order any entity from whom the debtor receives income to pay all or any part of such income to the trustee.

This provision at (i) specifies a three year period, but at (ii) states the period must be "not less than 5 years" if the current monthly income is at or above median family income. When the latter condition is true requires reference to statutory definitions of "current monthly income" and "median family income" and derivation of the ratio between them.

The phrase "current monthly income" to which reference is made at (ii) above, is defined at 11 U.S.C. § 101 (10A):

§ 101 Definitions.

* * *

(10A) The term "current monthly income"—

(A) means the average monthly income from all sources that the debtor receives (or in a joint case the debtor and the debtor's spouse receive) without regard to whether such income is taxable income, derived during the 6-month period ending on—

(i) the last day of the calendar month immediately preceding the date of the commencement of the case if the debtor files the schedule of current income required by section 521(a)(1)(B)(ii); or

(ii) the date on which current income is determined by the court for purposes of this title if the debtor does not file the schedule of current income required by section 521 (a)(1)(B)(ii); and

(B) includes any amount paid by any entity other than the debtor (or in a joint case the debtor and the debtor's spouse), on a regular basis for the household expenses of the debtor or the debtor's dependents (and in a joint case the debtor's spouse if not otherwise a dependent), but excludes benefits received under the Social Security Act, payments to victims of war crimes or crimes against humanity on account of their status as victims of such crimes, and payments to victims of international terrorism (as defined in section 2331 of title 18) or domestic terrorism (as defined in section 2331 of title 18) on account of their status as victims of such terrorism.

"Median family income" to which reference is also made at (ii) above, is defined at 11 U.S.

C. § 101(39A):

§ 101 Definitions.

* * *

(39A) The term "median family income", means for any year—

(A) the median family income both calculated and reported by the Bureau of the Census in the then most recent year; and

(B) if not so calculated and reported in the then current year, adjusted annually after such most recent year until the next year in which median family income is both calculated and reported by the Bureau of the Census, to reflect the percentage change in the Consumer Price Index for All Urban Consumers during the period of years occurring after such most recent year and before such current year.

The ratio required by § 1325(4)(A)(ii) of current monthly income multiplied by 12

versus "median family income of the applicable State" is central to the intent of Congress in BAPCPA to maximize distribution to creditors in chapter 13. See In re Baud, 2011 WL at *11.

All chapter 13 debtors must complete Official Form B22C. Federal Rules of Bankruptcy Procedure 1007(B)(6). Debtors' B22C is attached to their petition. It states that their annualized current monthly income is \$71,588.76. The Census Bureau's calculation requires a determination of the number of members of the household. Here it is undisputed that the number is three. At the time of debtors' filing, the applicable median family income in Ohio for a household of three was \$61,552.00. Census Bureau's Median Family Income By Family Size (cases filed between March 15, 2010 and October 31, 2010, inclusive).

Debtors annualized current monthly income is \$71,588.76; the relevant median family income is \$61,552.00. Debtors are clearly above median. Since this is the case, § 1325(4)(A)(ii) applies. We hold, therefore, that debtors plan must be for sixty months. See In re Baud, 2011 WL at * 21; In re Tennyson, 611 F.3d at 880; In re Lanning, 2007 WL 1451999, * 9 (Bankr. D. Kan. 2007), aff'd, 380 B.R. 17 (BAP 10th Cir. 2007), aff'd, 545 F.3d 1269 (10th Cir. 2008), aff'd, 130 S. Ct. 2464, 177 L.Ed.2d 23 (2010).

B. Debtors Payment Obligation.

Another consideration is to be taken into account in dealing with the Trustee's objection to debtors' chapter 13 plan. That consideration is the monthly amount which debtors must pay to the Trustee under a plan. The facts in this case show that at the end of forty-three months in the plan, debtors will have completed repayment of their 401(k) loan, currently being paid at the rate of \$280.54 per month. As stated in §1325(b)(1)(B), debtors are required to devote all of their "projected disposable income" to make payments

to unsecured creditors.

1. Monthly Payment Amount.

The Bankruptcy Court in Lanning had stated that it would consider the actual income and expenses of debtors as stated in their Schedules I and J. Id. at 2007 WL 1451999 *8, rather than means test income derived by applying § 1325(b)(3). No issue was made with this part of the Bankruptcy Court's decision in subsequent appeals. In presenting the plan that they have in the matter before us, debtors provide for payments in their plan of an amount derived from their Schedules I and J, the net they have computed from those schedules as did the Bankruptcy Court in Lanning. This Court therefore approves debtors' derivation of disposable income for plan purposes.

2. Projected Disposable Income.

The income depicted in the present debtors' Schedule I includes a deduction for repayment of their 401(k) loan in the amount of \$280.54. That loan will be repaid in forty-three months. The disposition of the \$280.54 thereafter presents a question, for the plan will continue beyond forty-three months.

The U.S. Supreme Court in Lanning, 130 S. Ct. 2464, 177 L. Ed.2d 23 (2010), on subsequent appeal of the Bankruptcy Court's decision, addressed the question of the meaning of the phrase, "projected disposable income", a requirement of § 1325 (b)(1)(B). It held that "when a bankruptcy court calculates a debtor's projected disposable income, the court may account for changes in the debtor's income or expenses that are known or virtually certain at the time of confirmation." Id. at 2478.

Further, in Seafort, 437 B.R. 204 (BAP 6th Cir. 2010), the Court addressed a fact pattern very much like that before us. In that case, debtors proposed in their Chapter 13

plan that after their 401(k) loan was repaid, debtors would continue making the same payments into their 401(k) account. The Bankruptcy Appellate Panel held that to be improper. It held that "[b]ecause repayment of 401(k) loan during the life of the plan can be reasonably anticipated at the time of confirmation...post-petition income which becomes available after 401(k) loans are repaid must be considered as projected disposable income available to unsecured creditors." In re Seafort, 437 B.R. at 211. Thus, Seafort and Lanning instruct that the repayment of a 401(k) loan during the life of a Chapter 13 plan is a certain enough change in circumstances to cause resulting income to be included in the calculation of a debtor's projected disposable income.

So in the case before this Court, after forty-three months debtors must provide in their plan that the amount theretofore paid into their 401(k) account is to be paid to the Trustee for the benefit of unsecured creditors, for it is part of their projected disposable income.

CONCLUSION

In conclusion, the Court holds that debtors' chapter 13 plan cannot be confirmed because controlling case law requires (1) that debtors present a five year plan, and (2) that debtors' plan includes a provision that after forty-three months debtors shall include in projected disposable income the amount theretofore devoted to repayment of their 401(k) loan. In addition, the Sixth Circuit Court of Appeals in In re Okoreeh-Baah, 837 F.2 1030, 133 (6th Cir. 1988), cited with approval in In re Francis, 273 B.R. 87 (BAP 6th Cir. 2002), set the standard for good faith, "a sincerely intended repayment of pre-petition debt consistent with debtor's available resources." Because debtors' plan fails to comply with that requirement, the Court holds that it has not been filed in good faith. The Trustee's

objection to confirmation will be sustained.

Copies to:

Default List

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